77-1345

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-630

Telephone Users Association, Inc.

Petitioner,

v.

Public Service Commission

of the District of Columbia, et al.

Respondents.

PETITION FOR CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ARTHUR S. CURTIS
816 National Press Bldg.
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Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. A-630

TELEPHONE USERS ASSOCIATION, INC.

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner, Telephone Users Association, Inc., a non-profit association incorporated in the District of Columbia in 1963, for itself and others similarly situated, respectfully prays that a writ of certiorari issue to the District of Columbia Court of Appeals to review the decisions of November 3, 1977 and November 8, 1977.

JUDGMENT BELOW

The decisions of the District of Columbia Court of Appeals dated November 3, 1977 and November 8, 1977 are not yet officially reported but appear as Appendix A and B to this Petition for Certiorari in this case.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). On January 27, 1978 an Order Extending Time to File Petition for Writ of Certiorari to and including April 2, 1978 was signed by Warren E. Burger, Chief Justice of the United States.

QUESTIONS PRESENTED

1. Whether the Court below misconstrues an Act of Congress in permitting more than 8,000 Telephone Company employees to pay only part of their bill. (D.C.Code 43-201(a)).

2. Whether Section 43-412 of the Code of the District of Columbia, which states that "ALL expenses of ANY litigation including appeal shall be borne by the public utility..." (Capitalization, appellant's), is intended to include the expenses of intervenors who have been formally admitted as parties.

3. Whether there is need to resolve a conflict in standards between the two Courts of Appeals in the District of Columbia in the matter of expenditures by public utilities.

4. Whether the public is entitled to reparations when a utility disregards an existing order of its regulatory body with the result that its holding company is benefited and its consumers are harmed.

STATUTES INVOLVED

The D.C. Code, 43-201 (a) charges the Public Service Commission with upholding this standard:

* * * *

> "Every unjust or unreasonable or discriminatory charge...is prohibited and is hereby declared unlawful."

Section 43-412 of the District of Columbia Code provides as follows:

* * * *

> "ALL expenses of ANY litigation including appeal shall be borne by the public utility..." (Capitalization, appellant's)

Section 43-707 "Orders to remain in force pending appeal--Suspension of order," provides that

* * * *

> "All orders and decisions of the Commission shall remain in full effect...unless and until they are suspended, superseded, or rescinded by the Commission or are vacated by lawful order of the District of Columbia Court of Appeals." (District of Columbia Code)

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Fourteenth Amendments

STATEMENT OF THE CASE

Since 1963,when this Association was founded by undersigned Counsel and two other former school-teachers,the Association through its Counsel has represented the consumer interest before the Public Service Commission, D.C. and has brought each of the cases, with one exception due to illness of Counsel, to this Court on petition for certiorari. In one of these cases[1]Petitioner proved by affidavit of the former Chairman of P.S.C. that this very Chairman's three children were given employment by the local Telephone Company while he was Chairman and thus regulating its affairs, and further that he had sent acquaintances over to the Company for employment, without publicly disclosing any of this until the Association by motion in this Court requested that an inquiry be made. Even under these extreme circumstances this Court did not choose to hear the

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[1]The Telephone Users Association, Inc. v. The Public Service Commission of the District of Columbia and C & P Telephone Co., Inc., No. 1113, October Term, 1968.

consumers' complaints, apparently because the time of the consumer in telephone matters had not come.

The recent rulings of this Court in 77-421,[2] and 77-436,[3] October term, 1977, and in 76-1675,[4] and 76-1676,[5] October term 1976, while all denying certiorari, still are clear defeats for A T & T and while they represent victories only for major business interests which wish to compete with the existing monopoly, it is hoped that they signal a change in point of view by this Court as to this Court's willingness to hear the legitimate complaints of telephone rate payers that Constitutional rights and statutory protection are being ignored, by the tribunals below.

Therefore, the Association brings to this Court, in this Petition,matters relating to violation of

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[2]American Telephone and Telegraph Company v. M.C.I., et al.

[3]F.C.C. v. M.C.I.

[4]North Carolina Utilities Commission etc. v. F.C.C., et al.

[5]United States Independent Telephone Association, et al. v. F.C.C.

Constitutional and statutory rights, in the form of four questions and four arguments, with the humble prayer that this Court will finally grant the Association the privilege of writing its brief anf making its oral argument.

The specifics as to why this Court should hear this particular case are set forth in the four arguments and therefore it will save the Court time not to repeat them here.

REASONS FOR GRANTING THE WRIT

I. The Tribunals Below Misconstrue an Act of Congress in Permitting More Than 8,000 Telephone Company Employees to Pay Only Part of Their Own Bills.(D.C. Code, 43-201(a)).

II. An Act of Congress Has Been Misconstrued and Requires This Court's Correction.(43-412)

III. There is a Conflict Between the Two Courts of Appeal in the District of Columbia as to the Standards Which a Public Utility Must Follow in the Matter of its Expenditures.

IV. The Supervision of This Court Must Be Exercised to Prevent Abuse of Discretion to the Public Detriment by the Tribunals Below and to Provide for Reparations.

ARGUMENTS

The arguments which follow are shown in the same sequence as they appear immediately above.

I. The Tribunals Below Misconstrues an Act of Congress in Permitting More Than 8,000 Telephone Company Employees to Pay Only Part of Their Own Bills.

The D.C. Code, 43-201(a) charges the Public Service Commission with upholding this standard:

> "Every unjust or unreasonable or discriminatory charge...is prohibited and is hereby declared unlawful."

When one person is asked to pay ALL of his telephone bill but another is only required to pay PART of his bill for a comparable service, 42-201(a) cited above is violated.

Since the beginning of telephone service, the Company has discriminated in favor of its employees by charging them only part of their bills while charging non-employees all of their bills. The more a Company employee spends on his phone, the more privilege he gets,the more this privilege is passed on to be paid as part of the bills of other telephone users. Today, in over 8,000 individual cases, the above described discrimination continues, in clear violation of 43-201(a).

In order No. 5790, May 17, 1976 the Proposed Opinion and order of the P.S.C. stated on page 79,

> "A first principle of regulatory law is equality of treatment. And so long as one group of persons gets preferential rates - in this case C&P employees - that equality is missing. Unlike department stores and other merchants who are said to offer discounts to their employees, the Company is a government-sanctioned monopoly providing the only source of an essential service. It is directed by law to establish rates which avoid undue preference and unjust discrimination. These precepts lead us to attach great importance to assuring that all C&P customers are treated equally. Consequently, we will order the employee discount ended" P. 79. As in the case of all other discounts, we will order the employee discounts phased out, beginning on January 1, 1977. (p. 81).

But in Order No. 5807, dated July 8, 1976 the Public Service Commission ruled that employee discounts were not unlawful and that the Company could continue to offer them if it so wished.

This Court should consider whether the ruling below, which saddles the consumer with over a million dollars a year in subsidies to Company employees is contrary to 43-201(a) as cited above.

The Court could also consider whether the consumer was being denied equal protection of the laws in a constitutional sense because consumers who do

not work for the Telephone Company are being ordered to pay higher rates than bookkeeppers, secretaries, lawyers, bill collectors, etc. who do work for the Company.

While the case of Public Service Commissions which are regulated by legislature is entirely different because the District of Columbia is regulated by Congress, it is noteworthy that some of the State commissions have denied such privileges as the local telephone company continues to grant.

In PUC v South Canaan Telephone Company, 20 (PUR (NS)476,(PA. PUC, 1937), the Pennsylvania Public Utilities Commission held,

> "The practice of allowing a discount of 50 percent of employee-subscribers who pay their telephone charges in full during the first fifteen days of each quarter is preferential, undesirable, and not in the public interest."

As applied to the District of Columbia, the due process clause of the Fifth Amendment embodies guaranty against the unjustified discrimination underlying the equal protection clause of the Fourteenth Amendment. Washington Free Community, Inc. v Wilson (1973) 157 App DC 360, 484 F2d 1078.

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; thus, if a classification would be invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment. Johnson v Robison (1974) 415 US 361, 39 L Ed 2d 389, 94 S Ct 1160.

A classification system which permits a utility to determine whether consumers should pay all or part of the telephone bills of its employees is thus not only unreasonable and discriminatory under 43-201(a) of the D.C. Code and thus unlawful by act of Congress, but it is also contrary to the above principles of constitutional law.

II. An Act of Congress Has Been Misconstrued and Requires This Court's Correction.

Section 43-412 of the District of Columbia Code provides as follows:

> "ALL expenses of ANY litigation including appeal shall be borne by the public utility..." (Capitalization, appellant's)

Webster's New International Dictionary of the English Language (1931) defines ALL as follows:

> "1. The whole quantity, extent, duration, amount, quality, or degree of; the whole; the whole number of, taken either collectively or distributively; any whatever; every; as, all the wheat; all the year; all the strength; all happiness; all abundance; beyond all doubt; you will see all (or all of us). (a. i.e., as an adjective)
>
> "2. Any OBS. "Without all remedy." Shak.
>
> "3. Only; alone; nothing but.
> SYN. --ALL, EVERY, EACH, agree in inclusiveness but different in stress. All collects, every divides, each distributes. ALL refers rather to the aggregate under which the individuals are subsumed than to the individuals themselves; as, all men are mortal.
>
> --a. The whole; in every particular; completely All. Wholly; Completely; Altogether; Entirely All (as a noun) 1. The whole number, quantity, or amount; The entire thing; everything included or concerned; the aggregate; the whole; totality; hence, specif., everything or every person; as, our all is at stake."

Despite the words of Congress that state that all costs of a utility case must be borne by the utility, and the clear meaning of the word "all", the Public

Service Commission permits the Telephone Company to use consumer dollars to pay its own legal expense, permits the Telephone Company to use consumer dollars to pay the Commission's own legal expense, but denies to consumers who are admitted as parties their right under this statute to have their own costs including Counsel costs to be paid by consumer dollars which have been collected by the Telephone Company as rates.

The above error must be corrected in order to provide a proper construction of the meaning of an Act of Congress as shown by the meaning of the words in the standard dictionary at the time that the words were used. Further a proper construction is needed in order to make it possible for consumer representatives to look after the interests with the same consumer dollars that the Telephone Company is using to defeat the consumer interests by furthering its own interests. More concretely, since the Telephone Company is making the consumer pay for the Company's costs in a legal proceeding to raise the rates, the consumer is equally entitled under this statute and the presence of the word "all" to require the Company

to pay such legal and other costs which the consumers experience in fighting the rate increase. This Court in the Alaska Pipeline case[1] stated that Counsel fees could be paid if there were a statute. Here there is a statute but Counsel fees have been denied. It is not absolutely necessary for Congress to waste words and where Congress says "all costs" Counsel fees must be included since they are a cost of a party in a litigation.

[1]Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)

III. There Is a Conflict Between the Two Courts of Appeal in the District of Columbia as to the Standards Which a Public Utility Must Follow in the Matter of Its Expenditures.

In Nader v. FCC, U.S.C.A.(D.C.) (1975), Nos. 73-1045, 73-2051, the Commission is charged with the following duty:

> "The Commission...must also determine whether: (2) the level of cash expenses is honestly, efficiently, and economically incurred;" (p. 1937,8)

Cash expenditures clearly include the expense account of the executives, yet Petitioner was denied its request to see the expense accounts of ANY executives of the Telephone Company, and this ruling was not disturbed by the D.C. Court of Appeals.

Here then is a clear variation or conflict in the standards applied by the U.S. Court of Appeals for the District of Columbia and the District of Columbia Court of Appeals. This Court should resolve the conflict at once.

Moreover, Counsel presented to the P.S.C. and to the court below, certified copies of indictments in North Carolina to the effect that officials of

the Bell Company there and the Company itself were involved in falsifying their expense accounts in order to create a political slush fund. These offerings were ignored both by the P.S.C. and the D.C. Court of Appeals, even though C & P like the North Carolina Company is totally owned by Bell (A T & T). See Transcript page 1760 for attempts by Petitioner to obtain by discovery whether the Company was padding in order to provide illegal contribution funds.

Referring to the words "efficiently" and "economically" above, the record shows that C & P is buying items from Western Electric at higher prices than it would pay for substantially similar items if bought from others. Both Western and C & P are wholly owned by A T & T. Here again there is a conflict in the standards applied in the Nader case by the U.S. Court of Appeals for the District of Columbia and in the case which comes to this Court through the other Appellate Court in the District of Columbia namely, the District of Columbia Court of Appeals.

IV. THE SUPERVISION OF THIS COURT MUST BE EXERCISED TO PREVENT ABUSE OF DISCRETION TO THE PUBLIC DETRIMENT BY THE TRIBUNALS BELOW AND TO PROVIDE FOR REPARATIONS.

In the previous rate case, known as Formal Case No. 595 the P.S.C. approved a one per cent licensing fee. The licensing fee is a charge which A T & T levies against the gross receipts of C & P of which it owns one hundred per cent of the stock, consisting in fact of exactly one share of stock. This ruling is found in Final Order No. 5690, Feb-19,1975

But on September 30, 1974 C & P began to pay one and one-half per cent of its gross receipts to A T & T without notifying the Commission or getting its consent. Since 1974 was the test year used by the Company in Formal Case No. 631 (this case), the Company was able to inflate its expenses by about $800,000 and then inflate them still more by borrowing the money back from A T & T at ten per cent. These facts are found in the testimony of C & P witness Petzold and cover what happened up to

October 1, 1975. The Final Order in Formal Case No. 631 would date from June 22, 1976, when the statuatory "consent" was filed by C & P. That Final Order approved a new rate of one and one-half per cent.

There is no question therefore that from September 30, 1974 when the one per cent rate ended, see Order No. 5790 Formal Case No. 631, page 86, until June 22, 1976, when the "consent" was filed, one-half of one per cent of the gross receipts of C & P were being extracted from the subsidiary by the holding company without the prior consent of P.S.C. even though such consent might have been obtained--or denied--since Case No. ~~631~~ 595 was still being adjudicated by the P.S.C.

C & P was therefore in direct violation of an order of its regulatory body by which under the unquestioned rules of administrative law it was bound until a new order would be forthcoming.

The public is therefore entitled to reparations of one-half per cent from September 30, 1974 to June 22, 1976 in an estimated amount of well over a million dollars.

Section 43-707 "Orders to remain in force pending appeal--Suspension of order," provides that

> "All orders and decisions of the Commission shall remain in full effect...unless and until they are suspended, superseded, or rescinded by the Commission or are vacated by lawful order of the District of Columbia Court of Appeals." (District of Columbia Code)

At no time in any proceeding did the Commission approve, retroactively, the additional one-half per cent which the holding company required local subsidiary C & P to pay. Under the circumstances, to make the rule retroactive now, or to view the Final Order in the present case as being retroactive in effect, would ignore the clear intent of 43-707, would encourage similar disobedience of Commission regulations, and encourage future raids on the consumer by the New York holding company, all of which is to say it would be contrary to the public interest, and thus unreasonable. Being unreasonable, such a retroactive rule would be invalid, People of State of Cal., By and Through State Lands Commission v. Simon, Em.App. 1974, 504 F.2d 430, certiorari denied 95 S.Ct. 496, 419U.S. 1021, 42 L.Ed.2d 294. Giving

retroactive application would result in the manifest injustice to the consumers and thus be frowned upon, Saint Francis Memorial Hospital v. Weinberger, D.C. Cal.19 76, 413 F.Supp.323.

The tribunals below, in failing to grant these reparations, were in effect saying that the Telephone Company could violate the prevailing order of its regulatory body without even notifying the P.S.C. and to the personal profit of the New York holding company.

In a similar case the Michigan Public Service Commission not only disallowed the increase in the License Contract from one per cent to a higher figure, but it held that $453,000 had to be refunded. Case No. U-4820, dated May 17, 1976, pages 20, 21, 24.

The supervision of this Court must be exercised to prevent such abuses and such damage to the public interest, and this Court should hear the matter and order such reparations as it deems just.

CONCLUSION

Since 1963, this Association has sought to protect the interests of telephone rate payers by the recognized and conservative[1] measures of representing the consumer in hearings and appeals. Violations of clear statuatory rights and less sharply defined Constitutional rights are shown in the preceding pages. The refusal by the tribunals below to permit disclosure of the expense accounts of the Company's executives helps neither the consumer nor the stockholder since both are victims where executives have such immunity from inspection.

Petitioner humbly prays that this Court will permit its Counsel to file its brief here and air its arguments before this Court.

Respectfully submitted,

ARTHUR S. CURTIS, Counsel for TUA, Inc.
816 National Press Building
Washington, D.C. 20045

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[1] The Articles of Incorporation, drafted by undersigned Counsel in 1963, provide that the Association is opposed to public ownership of the Telephone Company. The Court should take judicial notice that in most nations the telephone company is government-owned.

APPENDIX PAGE

I. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI 25

II. OPINION OF D.C. COURT OF APPEALS DATED NOV. 3, 1977 26

III. OPINION OF D.C. COURT OF APPEALS DATED NOV. 8, 1977 30

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 27, 1978

Arthur S. Curtis, Esquire
816 National Press Building
Washington, D.C. 20045

Re: Telephone Users Association, Inc. v. Public Service Commission of the District of Columbia, et al., A-630

Dear Mr. Curtis:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Mr. Chief Justice Burger who, on January 27, 1978, signed an order extending your time to and including April 2, 1978.

A copy of the Chief Justice's order is enclosed.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Francis J. Lorson
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. A-630

TELEPHONE USERS ASSOCIATION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1978

/s/ Warren E. Burger

Chief Justice of the United States

OPINION OF D.C. COURT OF APPEALS
DATED NOV. 3, 1977

Memorandum Opinion and Judgment

Once again appealing from orders of the Public Service Commission, Telephone Users Association (TUA) challenges the final orders in Formal Case No. 631 which granted The Chesapeake and Potomac Telephone Company (C&P) a general rate increase of $7,411,000 in additional gross revenues (which was approximately half of the amount sought by C&P). Finding all of TUA's contentions to be without merit, we affirm.

As a threshold issue, TUA argues that the Commission should have dismissed C&P's application for an increase in rates on the grounds of res judicata, contending that Case No. 631 was merely a retrial of the company's rate case decided a year earlier. In utility ratemaking proceedings, however, it is a basic principle that every rate order may be superseded by another, and that the concept of res judicata does not apply. Tagg Brothers & Moorehead v. United States, 280 U.S. 420, 445 (1930); 2 K. DAVIS, ADMINISTRATIVE LAW §18.09 at 610 (1958); see D.C. Code 1973, §43-702 and 43-709. Moreover, undisputed evidence indicated that C&P had experienced significant changes in its investment, expenses, and cost of capital since the last rate case, and there was no relitigation of the issues previously addressed.

TUA next attacks C&P's transactions with its parent, American Telephone and Telegraph Company (AT & T), and with Western Electric Company, a wholly-owned subsidiary of A T & T. Specifically, TUA alleges error in the Commission's acceptance of: (1) C&P's payment to A T & T for services received pursuant to the license contract; (2) C&P's payments to Western Electric for services and equipment; and (3) C&P's participation in the consolidated income tax return filed by A T & T. Substantial and uncontradicted record evidence however, supports the Commission's findings as to the legal validity and reasonableness of those transactions. Record evidence

also demonstrates that such transactions have benefited District of Columbia telephone subscribers in the form of reduced rate base investment and lowered operating expenses. Consistent with prior holdings on similar issues, we reject TUA's allegations as lacking foundation in law and fact. See, e.g., Telephone Users Association, Inc., v. Public Service Commission, 271 F. Supp. 393, 394 (D.D.C.1967).

TUA also contends that the Commission erred in authorizing a 9.45% overall rate of return, primarily by (1) improperly selecting calendar year 1974, adjusted for known changes, as the test period, and (2) disregarding the comparable returns allowed other local utilities. The Commission's determinations, however, are in total conformance with the prevailing legal standards, with evidence of record, and with previous court decisions. See, e.g., Telephone Users Association, Inc. v. Public Service Commission, supra, at 394.

Furthermore, TUA's allegations that expenditures made by C&P's managers were not honestly, efficiently, and economically incurred are without any record support, and its contention that C&P carried the burden of proving good faith as a precondition to rate relief is contrary to the standard enunciated by the Supreme Court in West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U.S. 63, 72 (1935). Equally specious is TUA's attack on the Commission's findings establishing a proper rate structure for C&P.

In addition, no legal basis exists to support TUA's claim that the Commission's allowance of C&P's employee concession service is discriminatory or unlawful. The service, whereby employees receive telephone service at reduced rates, has been in effect, and consistently approved by the Commission, since 1913. In addition, similar discounts have been approved in other jurisdictions, including those served by C&P,1/ and are a common form of business practice. The Commission recognized that the discounts were part of the employees' compensation, and

we find no abuse of discretion in its conclusion on this issue.

Finally, the Commission properly rejected TUA's demand for counsel's fees on the basis of D.C. Code 1977 Supp., §43-412. As a general rule, litigants before an administrative body must bear the expense of their litigation, and a commission has no authority to order one party to reimburse another in the absence of specific statutory mandate. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 169 U.S. App. D.C. 113, 514 F.2d 1354 (1975). Section 43-412 does not confer authority on the Commission to direct C&P to reimburse TUA for its legal expenses. On its face the section applies only to the Commission and People's Counsel.2/.

There being no error requiring reversal, it is

ORDERED and ADJUDGED that the subject orders of the Commission be, and they hereby are, affirmed, and the appeal is dismissed. See D.C.Code 1973, §43-705.

PER CURIAM.

FOR THE COURT:

ALEXANDER L. STEVAS,
Clerk.

1/ See, e.g., In re C & P, 10 P.U.R. 4th 255, 267 (Va. 1975); In re Mountain States T & T Co., 8 P.U.R. 4th 547, 556 (Ariz. 1975); In re C & P, 36 P.U.R. 3d 417, 424 (W.Va. 1960); New York Tel. Co., 5 P.U.R. 3d 33, 58 (N.Y. 1954).

2/ The legislative history of the statute indicates that its purpose is to reimburse only the Commission (and, by amendment in 1975, the People's Counsel) for its investigative expenses. See Washington Ry. & Electric Co. v. District of Columbia, 77 F2d 366 (D.C. Cir. 1935). Obviously, if § 43-412 as originally enacted had been applicable to all litigants in a utility proceedings, the 1975 amendment would have been unnecessary.

OPINION OF D.C. COURT OF APPEALS
DATED NOV. 8, 1977

BEFORE: Newman, Chief Judge, Harris and Mack, Associate Judges.

O R D E R

On consideration of petitioner's "Motion Requesting Judicial Notice of New Materials Relevent Here", it is

ORDERED that petitioner's motion is denied.

PER CURIAM.